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No. 93-1513

In The

Supreme Court of the United States

October Term, 1993

KURT HENRY VAN ENGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS BRIEF OF THE NATIONAL ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION OF KURT HENRY VAN ENGEL FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The prosecution launched a sting operation without any sound basis against a lawyer for a client under investigation and pursued it for two years without any evidence or leads to evidence of illegal conduct, impeding the effectiveness of counsel on behalf of the client and causing significant delay and expense for the client. The question presented is:

Can a prosecutor in a complicated white collar investigation wrongfully interfere with a putative defendant's relationship with his lawyer without violating the Fifth or Sixth Amendments, and without consequence to his case?

II. A second question is also subsumed in the first:

Should Harmless Error be Defined by Relationship to Conviction Reversing Impact or, According to Terms of the Federal Statute, by Effect on Substantial Rights?

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Interest of the Amicus

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 7,000 regular members and 25,000 affiliate members representing lawyers from every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants in federal criminal trials and appeals. Many of its members are CJA panel attorneys who represent indigent clients.

The NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversarial system of justice. The Amicus Curiae Committee of the NACDL has discussed this case and decided this issue is of such importance to the representation of criminal defendants and to defense lawyers through the nation that the NACDL should offer its assistance to the Court. The Prosecutorial Misconduct subcommittee has also indicated its concern with this case.

One of the primary concerns of the NACDL, its membership and affiliates, is the accused's right to effective and vigorous representation by competent and effective counsel who hold the interests of their clients primary in

their representation. The admitted conduct of the prosecution attorneys in the case at bar poses serious questions about such effective and vigorous representation in the future – not only for criminal defendants but also for civil litigants.

Consent of the Parties

Both parties have consented to the filing of this Amicus Brief in Support of the Petition of Kurt Henry Van Engel for a Writ of Certiorari.

Statutes and Rules Involved

"28 U.S.C.A § 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (Enacted May 24, 1949, c. 139, Sec. 110, 63 Stat. 105.)

"Federal Rule of Criminal Procedure 52. Harmless error

a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

The first federal harmless error law, Act of February 26, 1919, ch. 48, 40 Stat. 1181, stated:

"All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in

the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defenses, or exceptions which do not affect the substantial rights of the parties."

Statement of Facts

Amicus relies upon the statement of facts contained at pp. 3-10 in the petition for certiorari filed in this case.

Summary of the Case: Importance of the Issues Presented

This case presents a clear case of substantial prosecutorial misconduct, as determined by both the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit, but for which misconduct the Seventh Circuit deemed no remedy appropriate. This prosecutorial misconduct had multiple impacts: it not only impacted on the ongoing criminal representation of the accused, Mr. Van Engel by causing the retention of a replacement criminal counsel while Mr Van Engel's original attorney, Mr. Kravit, was under investigation; it also delayed the processing of the criminal case by nearly two years during phony negotiations with Mr. Van Engel's original attorney, Mr. Kravit. In effect, for several years the prosecutor manipulated the defense representation like a puppet on a string. The district court found that this

misconduct impacted in a prejudicial manner permeating *both the pre and post indictment phases and that it would impact upon the trial.*

Not only does the case present important questions about the Sixth Amendment right to representation by counsel, it also presents serious questions about due process limits upon the government's ability to infringe with impunity the Fifth Amendment due process right to counsel in civil cases. Mr. Kravit was originally Mr. Van Engel's civil attorney in negotiating settlements to several civil RICO cases. Permitting remediless harm in situations such as the instant case impacts upon the right to a civil attorney, for it suggests that the value of such attorney's knowledge and experience with the affairs of a client are not an asset but a potential snare and danger to the client. If that civil lawyer can become the target of baseless sting operations, the client can never trust a civil lawyer. Instead of a helpful counselor, such civil attorneys suddenly become "potential co-conspirators." It is ironic that the most ethical and honorable attorneys are most hurt by the Seventh Circuit's decision. The instant case presents an unfortunate illustration, for the lawyer who became the target of the baseless sting was himself a former Assistant United States Attorney – a group from whom we presume relatively few felons emerge.

When prosecutors engage in "egregious misconduct" in the process of investigating criminal activity, "the proper focus should be on whether the government's conduct has breached the standard of fundamental fairness, constituting a violation of the defendant's due process rights. . . . " Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far*

Will the Courts Allow Prosecutors to Go?, 54 U.Pitt. L. Rev. 405, 474 (1993). Unfortunately, that focus was lost in the decision by the Seventh Circuit.

Moreover, this case also enables examination of whether this Court should exercise its supervisory power over federal courts to ensure that justice appears to be even handed and balanced, and that prosecutors are not seen as having unlimited power to abuse defendants' rights, under the federal harmless error statute and Federal Rule of Criminal Procedure 52(a). The Seventh Circuit's opinion would only check such abuse if the investigation turns up evidence subject to suppression in the case in chief. Had a defense attorney engaged in similar conduct with respect to a prosecutor, it is probable that such an attorney would risk several serious criminal charges including obstruction of justice. It is suggested that an important question related to the application of the harmless error test is presented by this case.

Argument

The Importance of Preventing Unwarranted Prosecutorial Interference With The Right to Counsel Before Indictment or Information

Prosecutorial misconduct is unfortunately today not just a matter of quality control in selecting Assistant United States Attorneys: It threatens to strike at the core legitimacy of the American criminal justice system. One measure of the perceived growth of such misconduct is that at least two treatises have been published with regular updating: Gershman, *Prosecutorial Misconduct*, (1985), and, Lawless, *Prosecutorial Misconduct, Law – Procedure – Forms* (1985). "Misconduct is commonly met with judicial

passivity and bar association hypocrisy." (Gershman, *supra* at Intro., ix) Another very rough measure is the astounding increase in the numbers of published opinions in which such prosecutorial misconduct is alleged over the last two decades: an increase of 1623 percent in federal courts and of 3180 percent in state courts![1]

The sanctions this Court has previously ratified regarding prosecutorial misconduct apply realistically only to misconduct that occurs in front of the court during trial. Yet prosecutorial misconduct can take many other shapes that only accidentally comes to the attention of the court or the defense counsel. "As courts and commentators have noted . . . the existing sanctions are either too infrequently employed or ineffective to punish or prevent misconduct." Gershman, *supra*, at Sec. 13-1.

On the civil side, the threat of the federal prosecutors to freeze all of the assets of the law firm of Kaye, Scholer, Fierman, Hays, and Handler, resulted in a $41 million settlement 6 days later because as the Wall Street Journal described, the tactic "sapped Kaye, Scholer's will to fight." Kolb, *Excess in the Legal System*, 31 No. 3 Judges J. 22, 38 (1992). Yet, Kaye, Scholer had vigorously denied any liability.

On the criminal side, federal prosecutors in Chicago have been found involved in smuggling contraband into

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[1] The ALLFEDS database of Westlaw indicates that for the decade 1965-1974, only 175 cases contain the phrase "prosecutorial misconduct"; for the decade 1975 - 1984, 1137 such cases are reported; but for the decade 1985 - 1994, 2841 cases are reported. The comparable state figures (ALLSTATES database) are 158 cases, 2335 cases and 5025 cases.

jail cells and facilitating special (sexual) favors for cooperating witnesses that had facilitated a series of impressive victories against the notorious El Rukn gang. Hansen, *Gang Convictions Challenged*, 79 March A.B.A.J. 28 (1993). *See United States v. Boyd*, 833 F.Supp. 1277, 1281 (N.D. Ill. 1993) (reversing convictions of some of the most hardened and anti-social criminals in the history of Chicago in a case described as tragic, involving the squandering of millions of taxpayers' dollars, tainting hard-earned and well-deserved reputations for professionalism in the United States Attorney's Office for the Northern District of Illinois, because in part the lead prosecutor "was willing to abandon fundamental notions of due process of law and deviate from acceptable standards of professional conduct."); *United States v. Andrews*, 824 F.Supp. 1273 (N.D. Ill. 1993); *United States v. Burnside*, 824 F.Supp. 1215 (N.D. Ill. 1993). All too many of these "victories" have been sapped by subsequent trivial sentences in many of these El Rukn cases. *7 Rukns Cut Deal for New Prison Sentence*, Chicago Tribune November 30, 1993, Chicagoland, p.1 (20 year sentences converted to time served); *Another Rukn Case Figure Gets a Pass*, Chicago Tribune, Jan. 28, 1994, Chicagoland Section, p.4. (sentence reduced to one year, time already served.)

Nor are such problems confined to Chicago prosecutors. For example, the case of John Demjanjuk (allegedly Ivan the Terrible of the Treblinka death camp) only recently resulted in an Sixth Circuit opinion castigating the prosecutor's "win at any cost" philosophy. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 355 (6th Cir. 1994). In the Ninth Circuit the government sought to use testimony of a Chinese drug informant who revealed on the witness

stand that his confession had been tortured out of him by officials of the Peoples Republic of China and who then sought asylum, causing the drug case to fall apart. (Some of these PRC officials were apparently permitted to flee this county right after the testimony.) Subsequently the United States government attempted to repatriate that recanting witness to the PRC. *Xiao v. Barr*, 979 F.2d 151 (9th Cir. 1992); *United States v. Lun*, 944 F.2d 642 (9th Cir. 1991).

Win at any cost philosophy may not be confined to criminal prosecutors, but it is certainly a philosophy deserving of firm rejection from this Court, even though "each side truly believes it is at war with the other." Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. Pitt. L. Rev. 515, 517 (1992).

The Rise of Charge Bargaining under the Federal Sentencing Guidelines Means that Rules Adopted by This Court Regarding the Time at Which the Application of the Sixth Amendment Right to Counsel Attaches are Impractical

Ever since enactment of the Federal Sentencing Guidelines, plea negotiations for preindictment pleas have greatly increased, as was predicted would be the case.[2] According to Rule 7(b) of the Federal Rules of

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[2] "Well before the adoption of the Guidelines, scholars warned that charge bargaining could undermine the success of the Guidelines' efforts." Lear, *Is Conviction Irrelevant?*, *supra*, 40 U.C.L.A. L. Rev. 1239 n. 121. *See* McCall, *The Emperor's New Clothes: Due Process Considerations under the Federal Sentencing*

Criminal Procedure an individual can waive indictment and proceed by presentment of an information. This can be of particular value to defendants because it can create significant favorable results in many Guidelines sentence computations. This preindictment, precharge, negotiation requires competent counsel – counsel versed both in complicated guidelines issues as well as the substantive federal criminal law.

Early dispositions can affect relevant conduct. For example, the Fourth Circuit recently ruled in *United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993), *cert denied*, 114 S.Ct. 1086 (1994) that a member of a conspiracy is not responsible for drug amounts that were not reasonably foreseeable to that individual. Individual accountability and reasonable foreseeability are judicial determinations which also control mandatory minimums. *Id.; Accord, United States v. O'Campo*, 973 F.2d 1015, 1024 (1st Cir. 1992). A negotiated preindictment plea can foreclose otherwise potential adverse relevant conduct recited in an indictment. Indeed, a preindictment plea containing a carefully worded statement of fact is important for the court to consider at sentencing on the issues of relevant conduct.

Guidelines, 60 Tenn. L. Rev. 467, at 500 n. 173 (discussing "Gamesmanship") and also at 520 n. 307 (prosecutors now have a vast arsenal of weapons to choose from in sentencing) (1993). *See generally*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550 (1978) (Which noted that "charge" bargaining, rather than "sentence" bargaining, is particularly prevalent in jurisdictions in which mandatory sentencing has shifted discretion from the courts (in sentencing) to the prosecution (in charging).); Schulhofer, *Due Process at Sentencing*, 120 U. Pa. L. Rev. 733, at 757-72 (1980).

See United States v. Saldana, 12 F.3d 160 (9th Cir. 1993) (federal court has no discretion to decline to consider stipulation of facts for sentencing purposes).

A preindictment charge bargain (dismissal or non-filing of some charges in return for a plea of guilty to other charges) can also limit the offense for which other conduct might be "relevant" under the Guidelines. Not only do preindictment pleas control maximum and minimum penalties but they also provide a basis for a three level reduction as to the offense because of Acceptance of Responsibility.

In some cases, an individual may wish to actively cooperate with the prosecutors before charges are brought. This sort of preindictment negotiation by competent counsel can provide such an individual with a reduction of sentence under Guideline § 5K1.

In all of the foregoing circumstances, it is critical that an individual have competent counsel prior to indictment. The citizen need not be charged to learn of the existence of an investigation – as was the case for Mr. Van Engel. In some cases, for example, a minor charge in state court may reveal a pending larger investigation into more serious federal charges. Competent counsel, aware of what the government may or may not actually be able to prove and familiar with the intricacies of the Federal Sentencing Guidelines, can protect a client's interest through early plea negotiations.

Even though there have been attempts to prevent such precharge bargaining by issuance of Department of Justice policy restrictions it is "common knowledge among practitioners in federal courts that the policy is

sometimes ignored, and strictness in adhering to the policy varies not only from one judicial district to another but also within the same district. Supervision of the plea bargaining practices of line prosecutors, whether by [the Department of] Justice or the U.S. attorney in a given district (especially in a large office), is sometimes loose. . . . " Heaney, *The Reality of Guidelines Sentencing: No end to Disparity.* 28 Am. Cr. L. Rev. 161, 190-91 (1991). To add quality control problems among prosecutors (as in the instant case) only heightens the potential importance of pre-charge negotiations by competent defense counsel. Indeed, "since case pressure is a universal problem, the . . . policy could be read to grant the U. S. Attorneys unfettered discretion to approve charge bargaining." Nagel & Schulhofer, *A Tale of Three Cities: An empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines,* 66 S.Cal.L. Rev. 501, 511 (1992)[3]

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[3] The heavy load of criminal cases has been recognized by the Federal Courts Study Committee which reported "that some prosecutors and defense counsel evade and manipulate the guidelines to induce the guilty pleas necessary to deal with increased criminal caseloads." Heaney, *Reality of Guidelines Sentencing, supra,* at 28 Am. Crim. L. Rev. 161, 191). Public defenders in one large metropolitan center reported that individuals arrested with 50 pounds or less of marijuana were routinely permitted to plead guilty to a misdemeanor charge with a maximum sentence of one year, while a felony charge for 50 pounds of marijuana would result in a sentence range of 27 to 33 months for a first offender. *Id.* Other examples cited included disparities of as long as fourteen years. *Id.* There is preliminary evidence that such bargaining may particularly detriment women offenders (who may not have enough valuable information to bargain with) such as with respect to downward departures for substantial assistance. Raeder, *Gender Issues in*

Whatever the desirability of such bargaining, the plain fact is that it is widespread, particularly prevalent

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the Federal Sentencing Guidelines and Mandatory Minimum Sentences, 8 Fall Crim. Just. 20, 61 (1993). *See also*, Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, esp. 446-448 (1993).

Plea bargaining is critical to the day to day operation of the criminal justice system. In fiscal 1989, 87 percent of the criminal convictions in United States District Courts were by pleas of guilty or nolo contendere. (Annual Report of the Director of the Administrative Office of the United States Courts, 1989, p. 122, Table S15). "In a regime of sentencing guidelines, bargaining about the charge is also bargaining about the sentence." Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U.Chi.L.Rev. 901, 926 n.89 (1991). Indeed, "[Charge] bargaining has enormous impact on the Guidelines sentence. . . . " Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity not Disparity*, 29 Am. Crim. L. Rev. 833, 845 (1992). "The advantage of charge bargaining is that the defendants can pick the crime with the most favorable sentencing scheme under the Guidelines, thereby determine the sentence range." Gardner & Rifkind, *A Basic Guide to Plea Bargaining Under the Federal Sentencing Guidelines*, Section of Criminal Justice of the ABA, 7 Summer Crim. Just. 14, 15 (1992) The acumen of the defense attorney is quite important for, "If the stipulation includes facts supporting a more serious offense, then the court must use the Guidelines sentence for the more serious offense. (Guidelines § 1B1.2(a))" (*Id.*)

Charge bargaining is widespread as demonstrated by empirical research under the current sentencing guidelines, but the full extent of the practice is difficult to measure since the practice itself "makes it difficult to discern the extent and nature of guideline circumvention . . . because our best window on potential circumvention is to trace the differences between indictment charges and conviction charges. If the negotiation occurs before indictment, as it apparently sometimes does . . . circumvention is almost impossible . . . to detect. "Nagel & Schulhofer, *supra*, 66 S.Cal. L. Rev. at 516. In one district studied

in both white collar and drug cases, and substantially impacts upon the results in *more* criminal cases than actually are decided at trial or by any other manner! The lower estimate is that 20 percent of plea bargains involve

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such preindictment charge bargaining was largely confined to white collar cases. *Id.* Moreover, quality control problems have been discovered in the districts studied regarding the training and knowledge of the guidelines by both the AUSA's and the U.S. Attorneys as well. (*Id.* at 547) Such a picture is discouraging but pales against the description of one Chief Federal Defender as showing "frighteningly little sophistication in guidelines issues." (*Id.* at 547)

"[T]here has been a [post-Mistretta] diminution in date bargaining. However, fact bargaining, charge bargaining, and guideline-factor bargaining continue unabated." (*Id.* at 547) See generally, Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. Rev. 1179, (1993) (esp. at 1180 n. 2 and authorities cited therein.) "Fact bargaining occurs most often with respect to the amount of drugs or the particular drug involved, such as substitution of cocaine for crack, or in the dollar amount involved in economic crime." Nagel & Schulhofer, *supra*, 66 S.Cal. L. Rev. at 547).

Sentencing Commissioner Ilene Nagel reported in 1992 that a detailed review of 800 cases with 300 interviews indicated guidelines circumvention in from 20 to 35 percent of the cases resolved through a plea bargain. Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, 145 F.R.D. 149 (1993). Commissioner Nagel reported that all of these types of bargaining redounded to the benefit of the defendant and that "Circumvention is much more likely in white collar cases." (*Id.*) For example separate acts of bribery must be encompassed in a actual count of conviction to be factored into the guideline range. Reddy, *Guilty Pleas and Practice, Eighth Survey of White Collar Crime Procedural Issues*, 30 Am Crim. L. Rev. 1117, 1134 (1993). Civil consequences may also attend charge bargaining, such as "a preindictment plea . . . sav[ing] the client's financial resources in subsequent civil litigation." (*Id.* at 1135)

charge bargaining, fact bargaining or guideline bargaining, but only 13 percent of federal criminal cases are decided by methods other than pleas of guilty or nolo contendere. *Supra*, p. 11, n. 3.

Any rule that permits the prosecution an unfettered ability to commit prosecutorial misconduct prior to indictment in reality impacts upon the Sixth Amendment right to counsel in a most callous way. It smacks of Star Chamber which also jeopardized the defense attorney with threats of extreme personal sanctions. While the defense attorney in this case was not subject to the extreme Star Chamber penalty of "loss of his university degrees, . . . stand[ing] twice in the pillory, and . . . hav[ing] one ear cut off each time," *Faretta v. California*, 422 U.S. 806, 823 n. 18 (1976), the likely effect of such outrageous conduct on an attorney's legal practice is not all that different. The impact upon vigorous defense representation in the future is just as pernicious.

The value of legal representation prior to indictment under the new Federal Sentencing Guidelines is thus obvious to defendants who are guilty of some offense. Unfortunately, the same is true of those defendants who, while not guilty of anything, are tempted to resolve the uncertainty in their lives by means of a plea. The Seventh Circuit's opinion gives a potent weapon to prosecutors to increase the costs of competent defense, a weapon that may increase the number of innocent defendants who succumb to the overwhelming emotional and economic pressure upon them to plead guilty. To assert that "substantial rights" are not involved because an indictment has not been returned, blinks reality.

There are no realistic controls upon such misconduct other than judicial intervention. Unfortunately, "pressures inducing appropriate [prosecutorial] behavior are virtually nonexistent. . . . [T]he combination of special defenses and practical obstacles to winning civil lawsuits against prosecutors virtually immunize prosecutors from personal liability. . . . [Other] factors include . . . defense lawyers . . . fear . . . [of] retaliation, the tendency of jurors to side with prosecutors and disbelieve criminal defendants . . . and the [likely] limited recovery. . . . " Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, at 256-7, n. 101 (1993). Without judicial intervention there are no practical limits upon such prosecutorial misconduct. With the advent of the Guidelines, it is all the more apparent that a putative accused needs competent, effective counsel well before charges are brought. If an individual has entered into a private arrangement to retain counsel early in the process – as was the case for Mr. Van Engel – it is unreasonable for courts to allow deliberate government interference.

Should Harmless Error Be Defined by Relationship to Conviction Reversing Impact or, According to Terms of the Federal Statute, by Effect on Substantial Rights?

Underlying the structure of the Seventh Circuit's decision in this case is a mistaken application of the harmless error analysis mandated by 28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a). When the Seventh Circuit determined that no remedy was available, the decision also misapplied the precedents of this Court.

Harmless error refers to error that does not affect "substantial rights of the parties." It is not limited – as the Seventh Circuit misinterpreted – to error that directly affects the decision as to guilt. The Seventh Circuit's decision seriously misreads both this Court's precedents and the actual text of federal harmless error rules and statutes which speak of "substantial rights of the parties."

Current case law regarding the harmless error test often gives the impression that all that matters is the conviction reversing potential of asserted error. *United States v. Morrison*, 449 U.S. 361 (1981), may sometimes be read as limited to the "adverse effect" of a conviction. If the reviewing court cannot firmly determine that the result of a trial would have been different without the error, then that error is deemed "harmless."

Yet, the harmless error statute does not by its terms either require or permit the equating of "substantial rights" with "conviction reversing potential." Indeed, the first federal harmless error statute defined harmless error by a negative reference: harmless error was not mere, "technical errors,[4] defenses or exceptions." 40 Stat. 1181.

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[4] A much repeated example of the improper practice prior to federal "harmless error review" was the reversal of a criminal conviction because the indictment left out the word "the" so that the indictment read only "against the peace and dignity of ["the" omitted] State." (*See*, e.g., House Report No. 1949, 61st Congress, 3d Session (1911) which discussed an earlier harmless error proposal and cited *State v. Campbell*, 109 S.W. 706 (Mo. 1908).) The example of the missing "the" was frequently cited in both House and Senate reports as well as in Congressional debates over harmless error bills as a technical error that ought not to result in a reversal. By contrast, the words "substantial

"Substantial rights of the parties" are not defined by reference in 28 U.S.C.A. § 2111 to the "correct result of a trial."

This Court's harmless error analysis explicitly underlies many of the case lines that underpin the Seventh Circuit's decision in this case. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (which specifically stated that supervisory authority may not be permitted to conflict with the harmless error inquiry mandated by the Federal Rules of Criminal Procedure 52(a)). *Chapman v. California*, 386 U.S. 18, 22 (1967) recognized that all 50 states and the United States had adopted harmless error rules. The *Chapman* analysis was specifically referred to in *United States v. Morrison*, 449 U.S. 361, 365 (1981), which also stated "our approach has thus been *to identify and then neutralize the taint by tailoring relief appropriate* in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified *has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense*" (emphasis added). This Court expressly noted in *Morrison* that no claim of continuing prejudice or even discernible taint had been raised. (440 U.S. at 365, n. 2) Thus, in sharp contrast to the instant case in *Morrison*, there was no credible claim of harm or other prejudice to the defendant.

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rights" were discussed as the opposite of trivial or inconsequential error – they were not then, nor should they now be construed to refer to conviction reversing impact.

Application of the ordinary harmless error test of *Kotteakos v. United States*, 328 U.S. 750 (1946), is particularly difficult in cases, such as the instant one, in which no trial has yet taken place. Reviewing courts must always speculate about the level of constitutional taints upon the trial, but normally the courts have a trial record to examine. Reviewing courts in the instant case must "double speculate," both about the nature of the potential trial as well as the impact of the prosecutorial misconduct on that trial. *Kotteakos* rejected such nebulous speculation. This Court stated, "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . " Errors are to be, "not singled out and standing alone, but [taken account] in relation to all else that happened." *Kotteakos*, 763-764. (citations omitted).

The all "else that happened" in the case at bar includes serious error (prosecutorial misconduct) that increased the financial cost of criminal defense during years of futile negotiations and also added years of uncertainty and emotional turmoil for Mr. Van Engel, all events subsequent to the *known* commencement of the grand jury proceeding targeting Mr. Van Engel and the execution of the search warrant on his offices. This impact upon a defendant's rights simply cannot be properly categorized as "not affecting substantial rights."

It would be better to adhere to the text of Federal Rule of Criminal Procedure 52(a) which defines harmless error not by relationship to "taint speculation" or "conviction reversing impact" but by relation to an effect on substantial rights. *See also* 28 U.S.C.A. § 2111, as well as

the first federal harmless error statute, Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. The district court's factual determinations of the taint "affecting substantial rights" should stand unless clearly erroneous.

We submit that examination of both this Court's reasoning in *Kotteakos v. United States*, 328 U.S. 750 (1946), as well as the plain text and legislative history of federal harmless error statutes and rules, makes clear that harmless error was never contemplated to be limited to result reversing potential. The error that counts is not limited to error that impacts upon the correctness of the verdict. The error that counts is that which "affects substantial rights of the parties." This question is of such importance it merits this Court's attention.

CONCLUSION

We respectfully suggest that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit for these important questions presented.

Respectfully submitted,

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